

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Settlement Agreement and Request for Waiver)
Of Section 1.935 of the Commission's Rules)
)
Banana Communications, LLC and) File No. 0001941306
The United States Department of Agriculture)
)
Application for Consent to Assignment of)
PCS Licenses KNLH651 and KNLH653)
From Northstar Technology, LLC to)
Banana Communications, LLC)

ORDER

Adopted: May 13, 2009

Released: May 13, 2009

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order, we address the "Joint Request for Waiver, Approval of Settlement Agreement and Dismissal of Pleadings" filed on February 4, 2009 (Joint Request), by Banana Communications, LLC (Banana) and the United States Department of Agriculture (USDA) on behalf of the Rural Utilities Service (RUS) (collectively, "Joint Parties" or "Parties").

1 Joint Request for Waiver, Approval of Settlement Agreement and Dismissal of Pleadings, filed by Banana Communications, LLC and the United States Department of Agriculture (Feb. 4, 2009). RUS is the agency that administers USDA's Rural Development Utilities Programs.

2 FCC File No. 0001941306, filed by Northstar Technology, LLC and Banana Communications, LLC (Nov. 17, 2004). Banana amended the application on July 26, 2006, and August 14, 2006, to update certain administrative information.

3 Petition for Reconsideration, filed by the United States Department of Agriculture on behalf of the Rural Utilities Service (June 24, 2008).

4 In the Matter of Application for Consent to Assignment of PCS License KNLH651 and KNLH653 From Northstar Technology, LLC to Banana Communications, LLC, File No. 0001941306, and Applications of Northstar Technology, LLC for Renewal of Licenses for PCS Stations KNLH651 and KNLH653, File Nos. 0002985320, 0002985315, Memorandum Opinion and Order, 23 FCC Rcd 9122 (OMD & WTB 2008).

5 Opposition to Petition for Reconsideration, filed by Banana Communications, LLC (July 7, 2008).

USDA's response to Banana's opposition filed on July 11, 2008 (Reply).⁶ For the following reasons, we grant the Request for Waiver and approve the Settlement Agreement.

II. BACKGROUND

2. The Licenses for Stations KNLH651 and KNLH653 authorize Personal Communications Service (PCS), respectively, in the Madisonville, Kentucky (BTA273) and the Paducah-Murray-Mayfield, Kentucky markets (BTA339). Troup EMC Communications, Inc. (Troup EMC) won the F block Licenses in 1997,⁷ and assigned them to Banana on May 24, 2001.⁸

3. According to the record in this proceeding, Northstar entered into a Purchase and Sale Agreement with Banana in August 2001, in which Banana agreed to sell the Licenses to Northstar.⁹ Banana and Northstar filed an application to assign the Licenses from Banana to Northstar on September 6, 2001, pursuant to the agreement.¹⁰ Shortly after filing the application, on September 28, 2001, Northstar received approval of a multi-million dollar loan agreement with RUS to partially finance Northstar's telephone service in rural areas.¹¹

4. The September 6, 2001 assignment application was consented to on February 8, 2002,¹² establishing a consummation deadline of August 7, 2002. On August 20, 2002, Northstar filed a request to extend the deadline for consummating assignment of the Licenses until February 3, 2003.¹³ In the request, which was granted on December 20, 2002, Northstar explained that the extension would allow it to complete additional financing. Northstar consummated the assignment from Banana on February 3, 2003.¹⁴

5. Banana claims that the Purchase and Sale Agreement provided that if Northstar failed to make certain post-closing payments to Banana, each would cooperate to seek Commission consent to assign the Licenses back to Banana.¹⁵ Banana further claims that Northstar failed to make those

⁶ Response to Opposition to Petition for Reconsideration, filed by the Rural Utilities Service (July 11, 2008).

⁷ Troup EMC was the winning bidder for the Kentucky markets in Auction No. 11, the Broadband PCS (DEF block) auction. The Commission granted Troup EMC the Licenses on April 28, 1997, with a ten-year license term ending April 28, 2007.

⁸ FCC File No. 0000264535 (Nov. 17, 2000) (amended on March 5 and April 5, 2001). The assignment application was consented to on April 18, 2001, Wireless Telecommunications Bureau Grants Consent to Assign F Block Broadband PCS License, *Public Notice*, 16 FCC Rcd 8552 (WTB Apr. 18, 2001). Banana filed its consummation notification, FCC File No. 0000472723, on May 24, 2001, the same day the consummation was accepted, *Public Notice*, Report No. 911 at 4 (July 11, 2001).

⁹ Purchase and Sale Agreement, by and between Banana Communications, LLC and Northstar Technology, LLC (Aug 7, 2001).

¹⁰ FCC File No. 0000557822 (Sept. 6, 2001). The assignment application was accepted for filing also on September 6, 2001, *Public Notice*, Report No. 962 (Sept. 12, 2001).

¹¹ RUS submitted in this proceeding a copy of an agreement entitled "Telephone Loan Contract" dated September 28, 2001, among Northstar Technology, LLC, the United States of America, and the Rural Telephone Bank.

¹² Wireless Telecommunications Bureau Grants Consent to Assign C and F Block Broadband PCS Licenses, *Public Notice*, 17 FCC Rcd 2306 (WTB Feb. 8, 2002).

¹³ FCC File No. 0001002250 (Aug. 20, 2002).

¹⁴ Northstar filed its consummation notification on February 4, 2003, FCC File No. 0001183813, and the consummation was accepted on March 29, 2003, *Public Notice*, Report No. 1461 at 1 (Apr. 2, 2003).

¹⁵ FCC File No. 0001941306, Description of Transaction.

payments,¹⁶ and on November 17, 2004, Northstar and Banana filed the Assignment Application that is the subject of this proceeding. On November 18, 2004, one day later, OMD issued Northstar a Notice of Withholding of Action (Withholding Notice) pursuant to Section 1.1910 of the Commission's Rules (Red Light Rule).¹⁷ The Withholding Notice informed Northstar that it was delinquent on debt owed to the Commission in the amount of \$954,105.91 as a result of Northstar's default on installment payments for Station KNLF370, a C Block Broadband PCS license authorized in the Corbin, Kentucky market (BTA098) that Northstar acquired in 2001, from Third Kentucky Cellular.¹⁸ The Withholding Notice further warned Northstar that if it did not make full payment or a satisfactory arrangement to pay the delinquent debt within thirty days, the Assignment Application would be dismissed.

6. The Assignment Application was accepted for filing on November 24, 2004,¹⁹ and consented to on December 16, 2004.²⁰ Banana filed its consummation notification four days later on December 28, 2004.²¹ Consent to the assignment, however, was erroneously granted because Northstar had not yet resolved the debt issue. Commission staff, therefore, neither processed Banana's consummation notification nor issued public notice of the notification.²² Northstar therefore remained the licensee of record in the Commission's Universal Licensing System database.

7. On July 8, 2005, the Wireless Bureau dismissed the Assignment Application consistent with the Commission's Red Light Rule, but failed to provide notice of the dismissal at that time. In a letter dated October 18, 2005, Banana urged the Commission to reinstate the Assignment Application, process its December 28, 2004 consummation notification, and issue the Licenses to Banana.²³ Banana argued that the Red Light Rule does not apply, or in the alternative, asked the Commission to waive the rule.²⁴ The letter further argued that the Commission did not issue any "order, public notice,

¹⁶ *Id.*

¹⁷ 47 C.F.R. § 1.1910.

¹⁸ FCC File No. 0000606759 (Sept. 27, 2001). Northstar's failure to make the installment payments on the outstanding balance of Third Kentucky Cellular's winning bid resulted in automatic termination of the license for Station KNLF370 as of February 2, 2004. The Withholding Notice also warned that the Assignment Application would be dismissed if Northstar did not make payment on Station KNLG232, the F Block PCS license for Corbin, Kentucky (BTA098). The license for KNLG232, however, terminated automatically as of April 28, 2002, for failure to meet construction requirements. See *In the Matter of Northstar Technology, LLC Request for Waiver and Extension of the Broadband PCS Construction Requirements, Order*, 18 FCC Rcd 800 (WTB CWD 2003), *aff'd*, 19 FCC Rcd 3015 (WTB MD 2004) (denying Northstar's request for waiver and extension of time to construct the license for Station KNLG232).

¹⁹ *Public Notice*, Report No. 1999 at 2 (Nov. 24, 2004).

²⁰ *Public Notice*, Report No. 2024 at 8 (Dec. 22, 2004).

²¹ FCC File No. 0001986252 (Dec. 28, 2004).

²² On May 15, 2005, the Commission again reviewed the status of Northstar's delinquent debt, and determined that the debt remained unresolved.

²³ Letter from Russell H. Fox & Christopher R. Bjornson, Counsel for Banana Communications, LLC to Marlene Dortch, Secretary, Federal Communications Commission (Oct. 18, 2005) (October 18 Letter).

²⁴ October 18 Letter at 4-8. Banana asserted that consent to the Assignment Application became final 30 days after public notice, and that processing consummation notifications is a ministerial action. *Id.* at 3-4. Banana then argued that the Debt Collection Improvement Act of 1996, pursuant to which the Red Light Rule was enacted, does not apply to ministerial notifications or to assignment applications where the debtor is the assignor, not the assignee. *Id.* at 4-6. Banana also contended that Northstar's obligations to RUS were irrelevant because they were not the basis of the Commission's actions against Northstar under the Red Light Rule, and that the issues between Northstar and RUS were a private contractual matter beyond the Commission's jurisdiction. *Id.* at 2 n.5.

correspondence or other decision justifying a dismissal of [the] application,” which amounted to a “denial of due process to Banana and Northstar.”²⁵

8. In a letter dated July 5, 2006, the Mobility Division (Division) found that dismissal of the Assignment Application had in fact not become effective because notice had not been issued (Division Letter).²⁶ The Division therefore returned the Assignment Application to pending status, and on that same day, gave public notice of its action.²⁷ The Division Letter further directed Banana and Northstar to address Northstar’s still outstanding debt owed to the Commission within thirty days or to provide satisfactory reasons why the Red Light Rule should not apply.²⁸ The Letter warned that if the debt was not addressed within the time period provided, the Assignment Application would be dismissed pursuant to the Commission’s Red Light Rule.²⁹

9. Banana responded to the Division Letter on July 24, 2006, electing to argue once again that the Red Light Rule either does not apply to the Assignment Application or should be waived, incorporating by reference the arguments made in its October 18, 2005 Letter.³⁰ In addition, RUS filed a petition on August 4, 2006, seeking denial of the Assignment Application (RUS Petition to Deny).³¹ RUS stated that Northstar had also breached its payment obligations to the United States with more than \$7,944,342 in principal, interest, and fees owing to the USDA at that time.³² RUS argued that the United States holds a security interest in Northstar’s Licenses as collateral for outstanding debt owed by Northstar to the United States, and that grant of the Application would jeopardize the Federal Government’s ability to collect on Northstar’s defaulted loan.³³ While the pleadings were pending, on May 30, 2008, Northstar entered into a multi-party settlement agreement with the United States, which established a repayment plan for Northstar’s delinquent debts, including those owed to the Commission.³⁴

²⁵ *Id.* at 4 n.11.

²⁶ Letter from Katherine M Harris, Deputy Chief, Mobility Division to Carlos Carpenter, Northstar Technology, LLC; Harry Hudson, Banana Communications, LLC; and Russell Fox, Counsel for Banana Communications, LLC (July 5, 2006).

²⁷ *Public Notice*, Report No. 2566 at 1 (July 5, 2006).

²⁸ Division Letter at 2. The Letter noted that the debt payment owed to the Commission as of July 5, 2006, was in the amount of \$1,102,685.03 (\$992,588.00 plus accrued interest). *Id.*

²⁹ *Id.* at 2 (citing 47 C.F.R. § 1.1910).

³⁰ Letter from Russell H. Fox & Christopher R. Bjornson, Counsel for Banana Communications, LLC to Katherine M. Harris, Mobility Division, Wireless Telecommunications Bureau at 3-5 (July 24, 2006).

³¹ Petition to Deny Application by Northstar Technology, LLC to Assign Licenses to Banana Communications, LLC, filed by Rural Utilities Service (Aug. 4, 2006).

³² *Id.* at 1.

³³ *Id.* at 2-3. RUS also argued that because Northstar’s debt with the Commission had not been resolved, the Assignment Application should be dismissed under the Commission’s Red Light Rule. *Id.* at 4-5. Banana filed an opposition on August 14, 2006, incorporating by reference its October 18, 2005 and July 24, 2006 Letters, and arguing that the RUS Petition to Deny was filed in an untimely manner, that RUS has no standing in this proceeding, RUS had no security interest in the Licenses, the dispute is a private contractual matter properly brought before a state court, the Red Light Rule does not apply, its due process rights have been violated, and the public interest would be served because Banana can provide service while Northstar is unlikely to promote services under the Licenses because of its financial obligations. Banana Communications, LLC Opposition to Petition to Deny, filed by Banana Communications, LLC (Aug. 14, 2006).

³⁴ The settlement agreement is titled “Agreement Acknowledging Liabilities and Structuring A Mechanism For Making Payment On Them,” entered into on May 30, 2008, among Northstar Technology, LLC, Goose Rock Realty, LLC, Third Kentucky Cellular Corporation, Timothy Burnette, Carlos Carpenter, Thomas V. Hardy, John R. Hemphill, Thomas G. Ward, and the United States of America, on behalf of its agencies, the Federal

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Ten days later, on June 9, 2008, OMD and the Wireless Bureau issued their decision denying the RUS Petition to Deny, granting Banana's request for waiver of the Commission's Red Light Rule, and consenting to the Assignment Application.³⁵ Banana filed a second consummation notification on June 10, 2008,³⁶ and the notification was accepted nine days later on June 19, 2008.³⁷

10. RUS filed its Petition on June 24, 2008, seeking reconsideration of grant of the Assignment Application in the MO&O.³⁸ RUS contends that its Petition relies on new facts that demonstrate it holds a security interest in the Licenses, and requests that the Licenses be assigned to RUS.³⁹ Banana filed its Opposition on July 7, 2008, arguing that the Petition does not present new facts for the purposes of seeking reconsideration of an action, and should be denied.⁴⁰ RUS replied on July 11, 2008.

11. While the Petition for Reconsideration and responsive pleadings remained pending in this proceeding, Banana and USDA entered into a Settlement Agreement dated February 3, 2009, in an effort to resolve their differences. The Parties supplemented their Joint Request on February 20, 2009, providing certifications pertaining to the financial arrangements between the Parties.⁴¹ The Joint Parties seek approval of the Settlement Agreement, and upon approval, the Parties request dismissal of the Petition for Reconsideration, the Opposition, and the Reply (collectively, the "Pleadings").

III. DISCUSSION

12. The Commission codified certain policies in Section 1.935 of its rules for parties that have filed pleadings against an application and then seek to withdraw or request dismissal of the pleading in exchange for financial consideration.⁴² Those parties that wish to withdraw or dismiss their pleadings

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Communications Commission, the Federal Financing Bank, the Internal Revenue Service and the Rural Utilities Service. Petition at 2-3 n.7; Opposition at 3 n.9.

³⁵ MO&O, 23 FCC Rcd at 9127-29 ¶¶ 12-15. The MO&O also granted Northstar's request for waiver of the Red Light Rule with respect to its pending applications for renewal of the two Licenses. Northstar filed the renewal applications in a timely manner, but OMD withheld action on the applications also based on Northstar's debt owed to the Commission. On May 10, 2007, Northstar sought waiver of "applicable rules," arguing that the renewal applications were part of its effort to preserve its assets in an effort to repay its debt to the Federal Government. *Id.* at 9125 ¶ 7. The MO&O granted waiver of the Red Light Rule with respect to the renewal applications conditioned upon consummation of the Assignment Application. To deny the waiver request would result in termination of the Licenses, which would defeat the purpose of the relief otherwise granted in the decision. *Id.* at 9129 ¶ 17.

³⁶ FCC File No. 0003467897, filed by Banana Communications, LLC (June 10, 2008).

³⁷ *Public Notice*, Report No. 4174 at 1 (June 25, 2008).

³⁸ We note that RUS does not challenge the grant of the requests for waiver of the Red Light Rule with respect to the renewal applications for the Licenses.

³⁹ Petition at 3-6. In particular, RUS contends that financial documents executed on May 30, 2008, and multiple filings made in the Uniform Commercial Code records of the Office of Secretary of Kentucky, including the latest made on June 6, 2008, three days before the MO&O was released, perfected its lien on the Licenses and satisfies Commission requirements for security interests in licenses. *Id.* at 4-5.

⁴⁰ Opposition at 5-18.

⁴¹ Supplement to Joint Request for Waiver, Approval of Settlement Agreement and Dismissal of Pleadings, filed by Banana Communications, LLC (Feb. 20, 2009) (Supplement).

⁴² 47 C.F.R. § 1.935. The rule also applies in general to parties that file mutually exclusive applications and then enter into an agreement to resolve that mutual exclusivity by withdrawing or requesting dismissal of the applications. *Id.* The rules were formerly found in Section 22.129, *id.* § 22.129.

in exchange for financial consideration must first obtain approval from the Commission.⁴³ The rule section further provides that parties withdrawing or requesting dismissal of their pleadings must submit to the Commission a request for approval of the withdrawal or dismissal, a copy of the written agreement, and an affidavit setting forth a certification that the parties have not received any money or consideration in excess of the legitimate and prudent expenses incurred in preparing and prosecuting the application or pleading.⁴⁴

13. The Joint Request provides a copy of the Settlement Agreement and requests dismissal of the “Pleadings and any other outstanding pleading related to this matter.”⁴⁵ Under the terms of the Settlement Agreement, Banana will pay \$200,000 to the United States Treasury. Each Party certifies that neither has paid or received, or will pay or receive, any money or other consideration, other than as delineated in the Settlement Agreement, in exchange for dismissal of the Pleadings.⁴⁶ The Parties state that the payment “does not conform to the restrictions imposed by Section 1.935 of the rules” because the negotiated amount is unrelated to USDA’s legitimate and prudent expenses.⁴⁷ Banana and USDA therefore “request that the Commission waive the prohibition ... against a party’s receipt of money or other consideration in excess of ... legitimate and prudent expenses.”⁴⁸

14. To support their Joint Request, the Parties argue that denying the Request for Waiver would not serve the underlying purpose of the rule and would not be in the public interest.⁴⁹ The Joint Request argues that grant of the waiver is consistent with Commission precedent where it is evident that pleadings were not filed with the intent to secure payment for their withdrawal, where the Commission has waived portions of the settlement rule in an effort to resolve long-standing disputed licensing proceedings, and where resolution of the proceeding would enable service to be provided to consumers.⁵⁰ The Request further contends that Commission approval of the Settlement Agreement will permit United States taxpayers to recoup some of Northstar’s unpaid debt.⁵¹

15. We find that grant of the Request for Waiver is consistent with Commission precedent where a limited waiver of Section 1.935 of the Commission’s rules under the specific facts of the proceeding is warranted to the extent the rule limits settlement amounts, because to do otherwise would not serve the underlying purpose of the rule.⁵² In 2007, the Division granted a limited waiver in *Alltel*

⁴³ *Id.* § 1.935.

⁴⁴ *Id.* § 1.935(a).

⁴⁵ Joint Request at 2.

⁴⁶ *Id.* at Certifications. Specifically, each Party certifies that neither of the Joint Parties, nor any of Banana’s principals or any USDA related government entity, agency of instrumentality “has paid or received, or will pay or receive, any money or other consideration, other than as delineated in the Settlement Agreement between USDA and Banana Communications, LLC dated February 3, 2009 – the ‘Settlement Agreement,’ in exchange for the dismissal of any filing or pleadings or the withdrawal of any application related to the Memorandum Opinion and Order issued by the Federal Communications Commission ... designated by the document number DA 08-1368, released June 9, 2008.” *Id.*

⁴⁷ *Id.* at 2-3.

⁴⁸ *Id.* at 3.

⁴⁹ *Id.* at 4.

⁵⁰ *Id.* at 4-5.

⁵¹ *Id.* at 5. The Request concludes that receipt of the \$200,000 is a desirable outcome for both USDA and the American taxpayer. *Id.*

⁵² A waiver of the Commission’s rules may be granted where the applicant demonstrates that (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant of
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Communications, where a number of parties had filed mutually exclusive applications in 2002 for a cellular license in the New Mexico 3 RSA (Catron) market.⁵³ Multiple pleadings were filed in that proceeding raising new and complex issues. The Division granted a limited waiver to the parties in *Alltel Communications*, who had entered into a settlement agreement in 2007, because granting the waiver did not reward improper speculation or encourage the filing of abusive pleadings, it would permit the resolution of a long-standing and litigious dispute among the parties, and it would expedite cellular service to consumers in New Mexico.⁵⁴

16. Similarly, we find that grant of a limited waiver of Section 1.935 is warranted in this case. As the Commission explained in *Algreg Cellular Engineering*, Section 1.935 “reflects a balancing of our efforts to discourage the filing of speculative applications and pleadings designed solely to extract money from applicants, while still providing some incentive for legitimate petitioners and applicants to withdraw from proceedings and thus expedite service to the public.”⁵⁵ We find no evidence that either of the Parties in this proceeding had any expectation of profiting from their filings. Rather, as the Request explains, USDA “did not submit the Petition for Reconsideration as a means to extract money from Banana. Rather, USDA was trying to preserve what it believed to be its interests in the Licenses.”⁵⁶ In the certifications attached to the Joint Request, each Party states that “all pleadings, filings, and applications submitted in the context of the Dispute were filed in good faith with the intent of preserving [USDA’s and Banana’s] rights to the FCC licenses in the Dispute and were not filed with the intent to obtain a monetary settlement or other form of consideration.”⁵⁷ The pleadings that have been filed in this proceeding have raised legitimate issues, including whether RUS holds a security interest in the Licenses, rather than frivolous complaints in an attempt to abuse Commission processes.⁵⁸ Grant of the Request for

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the requested waiver would be in the public interest; or (2) in view of unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative. 47 C.F.R. § 1.925(b)(3).

⁵³ In the Matter of Settlement Agreement and Request for Waiver of Section 1.935 of the Commission’s Rules, *Order*, 22 FCC Rcd 4027 (WTB MD 2007) (*Alltel Communications*). The parties included Alltel Communications of the Southwest Limited Partnership; Commnet Wireless, LLC; McElroy Electronics Corporation; Smith Bagley, Inc.; and WWC License, L.L.C.

⁵⁴ *Id.* at 4032 ¶¶ 11-12.

⁵⁵ In re Applications of Algreg Cellular Engineering For Facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 307, Alabama 1 – Franklin, *Memorandum Opinion and Order and Order on Reconsideration*, 18 Communications Reg. (P&F) 301 (1999) (*Algreg Cellular Engineering*). *Algreg Cellular Engineering* addresses former rule section 22.129, which was later recodified under Section 1.935. See *Alltel Communications*, 22 FCC Rcd at 4031 ¶ 11 (citing Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission’s Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, WT Docket No. 98-20, *Report and Order*, 13 FCC Rcd 21027 (1998) (explaining the purpose of Section 1.935: “[t]he rule is intended to decrease the potential for parties to abuse the Commission’s processes by filing speculative applications and frivolous pleadings for the sole purpose of obtaining money and other consideration from other parties in exchange for withdrawing or seeking dismissal of applications and pleadings”); Amendment of Parts 2 and 90 of the Commission’s Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, *Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639, 2686, ¶ 126 (1995)) (explaining the purpose of Section 1.935: “[t]his rule deters frivolous protests, filed primarily for anticompetitive or abusive reasons and prevents the filing of speculative applications and pleadings (or threats of the same) designed to extract money from applicants”).

⁵⁶ Joint Request at 4.

⁵⁷ *Id.* at Certifications.

⁵⁸ See *supra* notes 24 and 33 and accompanying text (RUS has argued, for example, that the United States holds a security interest in the Licenses and that the Assignment Application should be dismissed under the Commission’s

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Waiver would therefore serve the underlying purpose of the rule because it does not reward improper speculation or encourage the filing of abusive pleadings.⁵⁹

17. We also find that limited waiver of Section 1.935 is in the public interest because it would permit the resolution of a long-standing and litigious dispute between the Joint Parties and would enable Broadband PCS service to be provided to consumers in Kentucky. Northstar and Banana filed their Assignment Application nearly four and one-half years ago, and RUS filed its Petition to Deny in 2006. In *Alltel Communications*, we granted a limited waiver, in part, to resolve issues over mutually exclusive cellular applications, which were between four and five years old.⁶⁰ As the Division explained in that decision, the Wireless Bureau has found the length of a proceeding relevant, in part, in determining whether to grant a waiver of Section 1.935.⁶¹ In 1999, the Wireless Bureau issued a limited waiver during a settlement window allowing parties to resolve contested licensing proceedings, some of which were more than five years old, without limitation on the consideration promised, paid, or received.⁶² In that proceeding, the Bureau found that granting a limited waiver of Section 1.935 would allow parties to resolve the disputes where the cost and delay of protracted litigation would further hamper the provision of wireless service to the public.⁶³ Similarly, a waiver would serve the public interest in the instant case by removing the uncertainty surrounding the Assignment Application at issue in this proceeding stemming from USDA's Petition for Reconsideration and the responsive pleadings. The Joint Parties note in their Request that "[w]ithout approval of the Settlement Agreement and the resolution of USDA's claims to the Licenses, Banana cannot fairly consider the Licenses its own."⁶⁴ Grant of a waiver would therefore also enable service to the public.

18. We therefore waive the provisions of Section 1.935 of the Commission's rules that limit the consideration paid among parties to settlement agreements and approve the Joint Parties' Settlement Agreement. We further grant the Parties' requests to dismiss USDA's Petition for Reconsideration, Banana's Opposition, and USDA's Reply.

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Red Light Rule; and Banana has argued that RUS had not perfected a lien on the Licenses and that the Red Light Rule does not apply because the debtor is the assignor, not the assignee).

⁵⁹ Cf. In the Matter of Zephyr Tele-Link, *Order*, 15 FCC Rcd 4247, 4248 ¶ 3, n.12 (CWD 2000) (declining to apply "the rule against 'greenmail' in this case, as there is nothing in the history of this proceeding to indicate that AALA's Petition to Deny Zephyr's application in the Oklahoma 4 – Nowata RSA was submitted for the purpose of extracting a settlement payment from Zephyr" (citing *Algrec Cellular Engineering*)).

⁶⁰ *Alltel Communications*, 22 FCC Rcd at 4032 ¶ 12.

⁶¹ *Id.*

⁶² *Id.* (citing Wireless Telecommunications Bureau Waives Limitations on Payments in Settlement Agreements Among Parties in Contested Cases, *Public Notice*, DA 99-745 (Apr. 16, 1999) (establishing 90-day period, effective upon publication of Public Notice in Federal Register) (WTB Waiver Public Notice); Waiver of Limitations on Payments in Settlement Agreements Among Parties in Contested Licensing Cases Expires on August 16, 1999, *Public Notice*, 14 FCC Rcd 7840 (WTB 1999); Wireless Telecommunications Bureau Extends Waiver of Limitations on Payments in Settlement Agreements Among Parties in Contested Licensing Cases, *Public Notice*, 14 FCC Rcd 13965 (WTB 1999) (extending settlement window to October 30, 1999)).

⁶³ WTB Waiver Public Notice at 1.

⁶⁴ Joint Request at 4-5. Banana has repeatedly stated in this proceeding that it would not begin to offer services under the Licenses until the Assignment Application is fully processed and the Licenses are issued to Banana. October 18 Letter at 3; July 24 Letter at 2.

IV. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 0.331, 1.925 and 1.935 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.925, 1.935, the Joint Request for Waiver, Approval of Settlement Agreement and Dismissal of Pleadings" filed by Banana Communications, LLC and the United States Department of Agriculture on February 4, 2009, is GRANTED.

20. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 303(r) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 405 and Sections 0.331, 1.106 and 1.935 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.1.06, 1.935, the Petition for Reconsideration, filed by the United States Department of Agriculture on behalf of the Rural Utilities Service on June 24, 2008; the Opposition to Petition for Reconsideration, filed by Banana Communications, LLC on July 7, 2008; and Response to Opposition to Petition for Reconsideration, filed by the Rural Utilities Service on July 11, 2008, are DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Katherine M. Harris
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau